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The Nova Scotia Trade Union Act, 1972

Innis Christie

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The much amended Trade Union Act of Nova Scotia¹ has been redrafted with a number of substantive changes. This note is simply to alert lawyers to the changes, and to some extent, to attempt to explain the reasons for them.

The new Trade Union Act², proclaimed October 1, 1972, has general application. Provisions relating solely to the construction industry constitute Part II. The general provisions found in Part I apply to the construction industry except where they are in conflict with the special provisions of Part II. The new Act incorporates most of the amendments to the Trade Union Act made in the last few years, but not the Construction Projects Labour-Management Relations Act of 1971³, the provisions of which govern where there is any conflict with the Trade Union Act. The Construction Projects Labour-Management Relations Act itself provides that any of its sections come into force only upon proclamation and may be made applicable to the whole or any part of the Province. Thus far that Act has been proclaimed only for areas where the construction of Michelin Tire Co. plants is taking place and, by its own terms, only a few sections, notably those dealing with picketing, remain in force after April, 1972.

On the subject of picketing, Section 40 of Nova Scotia's new Judicature Act⁴ should also be read in conjunction with the Trade Union Act. It provides that no interim or interlocutory injunction shall be granted *ex parte* in connection with a labour-management dispute unless a breach of the peace, interruption of essential public service, injury to persons or severe damage to property has or is about to occur and unless

*Innis Christie, Professor of Law, Dalhousie University.

1. R.S.N.S. 1967, c. 311, as amended by S.N.S. 1968, c. 59; 1969, c. 79; 1970, c. 5; 1971, c. 60; 1971, c. 61.

2. S.N.S. 1972, c. 19. Hereinafter sections of the Act are referred to without full citation.

3. S.N.S., 1971 (2nd sess.), c. 1.

4. S.N.S., 1972, c. 2.

reasonable attempts have been made to notify the person or trade union affected. Moreover the court must be satisfied that the case is a proper one for the granting of an injunction.

Before entering upon a detailed consideration of the new Trade Union Act, the most significant changes effected by it can be briefly stated. For a collective agreement to be effective under the Act the union that is party to the agreement must now be certified or recognized by a *formal* voluntary recognition, by agreement filed with the Minister of Labour⁵. On an application for certification the Labour Relations Board is now required to hold a representation vote of employees in a bargaining unit where a union has demonstrated more than 40% membership⁶. Protection is granted to unionized employees where, in an attempt to avoid obligations under the Act, their employer contracts out a significant part of the work which they do⁷. The role of an arbitrator under a collective agreement is clarified, arbitrators are granted powers necessary to the fulfillment of their function and a model arbitration clause is set out in the Act, to be included in any collective agreement where the parties have not provided for arbitration in some other form. The model arbitration provision provides for a single arbitrator rather than a three-man board⁸. It is made illegal to strike until fourteen days after a conciliation officer reports, where no conciliation board is appointed, rather than twenty-one days as previously provided. However, the Minister of Labour must be given notice forty-eight hours before any strike⁹. In the construction industry it is made legal to strike upon termination of a collective agreement or, in the case of a first agreement, ninety days after notice to bargain¹⁰. The law of unfair labour practices is codified and protection for the individual against unfair practices by the union is included¹¹. Finally, a major addition to the Act is the provision for the

5. S. 28 (1). The "recognition agreement" may be part of the collective agreement, which must be filed with the Minister of Labour in any case, as required by s.44.

6. S. 24 (2).

7. S. 29 (2).

8. S. 40.

9. S. 45.

10 S. 100.

11. Ss. 51 – 56.

accreditation of employers' association as bargaining agents in the construction industry¹²

Part I: Industrial Relations Generally

Interpretation

There are several new or substantially altered definitions in Section 1. One particularly worth mentioning is the definition of "employee"¹³ which now specifically includes persons engaged on a fishing vessel, policemen and local government employees¹⁴. The exclusion of persons in a supervisory capacity or positions of confidence with regard to labour relations, which was formerly found in paragraphs (i) and (ii) of Section 1 (j) now appears as subsection (2) of Section 1.

By Section 3 of the new Act employees of any board, commission or other agency of the Crown in right of the Province, other than those appointed by the Civil Service Commission or the Governor-in-Council, continue to be subject to the Act¹⁵. An extra thirty-day waiting period before a strike by policemen or servants of Crown agencies becomes legal is imposed by subsection (3) of Section 47¹⁶, which is the section dealing generally with time limits on the right to strike.

Two other important definitions are those which relate to the formalized voluntary recognition of bargaining agents under Section 28 of the new Act¹⁷. "Collective agreement" is now defined, in part, as "a signed agreement in writing between an employer . . . and a *certified* bargaining agent" and "certified bargaining agent" is, in turn, defined to include a bargaining agent "that is party to an agreement filed pursuant to subsection (2) of Section 28". The latter definition puts it beyond doubt that a bargaining agent which has been accorded formal voluntary recognition is in the same position as a

12. Ss. 94 – 99.

13. S. 1 (1) (k).

14. Formerly included in the definition of employee by virtue of R.S.N.S. 1967, c. 311, ss. 68B and 68A (1), which were added by S.N.S. 1970 – 71, c. 61, s.1 and 1969, c. 79, s.1 respectively.

15. Formerly by R.S.N.S. 1967, c. 311, s. 68 (2).

16. Formerly by R.S.N.S. 1967, c. 311, ss. 68 (2) and 68A (2).

17. S. 1 (c) and (e).

certified bargaining agent¹⁸. The effect of these definitions taken in conjunction with Section 28 is to protect employees from sweetheart agreements.

Voluntary recognition of bargaining agents by employers is a good thing both inherently, because the resulting relationship is not a forced one, and because it saves the administrative costs of the certification procedure. However, there is room for abuse where the union recognized does not, in fact, represent a majority of the employees in the unit. In Ontario the legislative solution to such "sweetheart" arrangements has been to provide that, while voluntary recognition in a collective agreement is, for the most part, fully as effective as certification, during the first year of the life of such an agreement the parties may be called upon to prove that at the time the agreement was entered into "the trade union was entitled to represent the employees in the bargaining unit"¹⁹. In Nova Scotia a different solution has been adopted. By Section 28 a recognition agreement, which may and usually will be part of a collective agreement, must be filed with the Minister of Labour to be effective as certification. Filing does not, however, make the agreement effective as certification where the union which is party to the recognition agreement "does not represent a majority of the employees in the unit defined by the agreement"²⁰. But, and it is an important "but", the Act goes on to provide that "the trade union is deemed to have represented a majority of those employees at all relevant times" when the employer has posted a copy of the recognition agreement in a conspicuous place on the premises and thirty days have elapsed from the posting²¹.

It would seem that if a recognition agreement had not been posted at all or if the required thirty days had not elapsed any other trade union, by application to the Nova Scotia

18. S. 28 is a redraft of s. 10B, which was added to the predecessor act by S.N.S. 1970-71, c. 60, s. 1. See also s. 1 (1) (a) (ii) for the definition of "bargaining agent".

19. The party wishing to challenge the collective agreement may make application to the Ontario Labour Relations Board. R.S.O. 1970, c. 232, s. 52.

20. S. 28 (3) (c).

21. S. 28 (3) (c).

Labour Relations Board²², could challenge the voluntary recognition on the ground that the voluntarily recognized trade union did not represent a majority of the employees in the unit. Such a third party trade union could, at any time, raise before the Board the question of whether the agreement had in fact been posted in compliance with Section 28. If it were held that there had not been a proper posting the union's representation of employees in the unit at the time the agreement was filed could be challenged²³. A successful challenge to its representation would mean that the voluntarily recognized union could no longer be treated as "certified" in accordance with the definition of "certified bargaining agent" in Section 1 (1) (c) and the effect of Section 1 (1) (e) would be that, for the purposes of the Trade Union Act, there would be no collective agreement.

Rights of Employers and Employees

The only section under this heading upon which any jurisprudence has developed in Canada is Section 13, which provides:

No person ceases to be an employee within the meaning of this Act by reason only of the ceasing to work for his employer as the result of a lockout or strike or by reason only of dismissal by his employer contrary to this Act or to a collective agreement.

In the predecessor section, which was Section 2 of the old Trade Union Act, it was provided that a person did not cease to be an employee "by reason only of his ceasing to work as the result of a lockout or strike *which is not contrary to this Act*". The dropping of the emphasized phrase makes the Nova Scotia provision similar to Section 1 (2) of the Ontario Labour

22. S. 28 (4). See Regulations pursuant to the Trade Union Act, proclaimed, Oct. 1, 1972, Reg. 21. Hereinafter the Regulations are referred to without full citation.

23. S. 28 (4) provides only for application "by a trade union" but, presumably in any other proceeding where it became relevant any person affected could raise the issue of proper posting and representation as well as any other grounds on which it might be alleged that s. 28 did not apply, such as those set out in s. 24 (3) (a) and (b).

Relations Act²⁴. Under both Acts it is now clear that participation in a strike, legal or illegal, does not terminate employment for statutory purposes. Employment is terminated by dismissal which is not contrary to the Act, or to a collective agreement, if there is one, or to the employment contract, where there is no collective agreement. In the terminology of the law of contract: if an employee repudiates his contract by engaging in an illegal strike or otherwise, the employer may accept the repudiation by discharging him, but it is the legal dismissal itself, not the strike or other cause for dismissal, which terminates the relationship.

Labour Relations Board (Nova Scotia), Composition and Operation

Subsection (7) of Section 15²⁵ is changed in that specific mention is made of the Board's "power to summon or enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things which the Board deems requisite to the full investigation of any matter within the jurisdiction".

Subsection (10) of Section 15 is unique among Canadian labour relations statutes in providing that the Board may make its decisions by separate consultation with the Chief Executive Officer²⁶ in the case of interim cease and desist orders under Sections 49 and 50 and in any other case where a hearing is not requested. In Section 91(9) the Construction Industry Panel has been given similar powers, which extend also to applications for certification pursuant to Section 92. Sections 49 and 93 provide for subsequent hearings and reconsideration at the request of any party. In the case of *Carl B. Potter Ltd. v. Construction Industry Panel*²⁷, on an application for *certiorari*, the Appeal Division of the Supreme Court of Nova Scotia quashed a decision of the Construction Industry Panel based on separate consultation by each Board member with the Chief Executive Officer without the specific statutory authorization now

24. R.S.O. 1970, c. 232.

25. Formerly s. 55 (6).

26. The existence of that very important person is now recognized by the definition in the Trade Union Act. See s. 1 (1) (d).

27. Unreported.

afforded by Section 91(9). However, the realities of a part-time tribunal called upon to make many routine decisions apparently were thought by the legislature to justify such a procedure. The new Saskatchewan Trade Union Act has taken the somewhat more extreme step of authorizing delegation to the Chief Executive Officer of any powers for the Board, subject to appeal to the Board itself²⁸.

The Board, and, by virtue of Section 91 (4), the Construction Industry Panel, may now make rules governing its procedure without Cabinet approval²⁹. Thus far the procedure of both tribunals is governed by Regulations approved by Cabinet and proclaimed October 1, 1972. Like the Act, the Regulations have been completely redrafted and now include twenty-one forms covering the procedure before the Board. However, should the Board or the Panel in the future choose to make procedural rules fleshing out but not contradicting the Regulations, this could be done under the new power to make rules. The Governor-in-Council might at some time see fit to make regulations relating to the operation of some part of the Trade Union Act other than that administered by the Labour Relations Board, such as conciliation, but thus far no such regulations have been made in Nova Scotia.

Acquisition of Bargaining Rights: Certification

The pattern of the sections in the predecessor Act relating to certification is followed but there are important changes in substance in the new Nova Scotia Trade Union Act. Section 22, which determines the timeliness of an application, signals the most important of these³⁰. Any union claiming as members 40% of the employees in an appropriate bargaining unit, rather than a majority as formerly required, may apply for certification where no collective agreement is in force and no bargaining agent has been certified. It must be noted that now, by virtue of the definition of "collective agreement" in the new Act³¹, for there to be a collective agreement in force where there has been no certification there must have been formal voluntary

28. The Trade Union Act, 1972, S.S. 1972, Bill 105, as am., s. 4 (12).

29. S. 17 (a) and definitions in s. 1 (1) (t) and (u).

30. See s. 7 of the former Act, R.S.N.S. 1967, c. 311.

31. S. 1 (1) (e), and see discussion *supra*.

recognition in accordance with Section 28. However, in most cases the collective agreement allegedly in force would itself contain a recognition clause which, upon filing with the Minister of Labour, would effectuate formal voluntary recognition³².

There is no change in the provision that certification without a collective agreement bars any other application for one year, except with the consent of the Board, but where there is a collective agreement there is a change in that an "open season" during which another union may apply for certification is unambiguously provided for. Application may be made during the last three months of any collective agreement for a term of three years or less and during the 34th, 35th and 36th month and the three-month period immediately preceding the end of each year after the third year of an agreement for a term of more than three years. In this way a balance is struck between stability and the right of employees to shift their allegiance to a new union. Every labour relations' statute in Canada contains a similar provision, although some jurisdictions have opted for an open season every two, rather than three, years³³.

Somewhat illogically, in the final two subsections of Section 22 the provision of the old Act allowing for a multi-union application for certification is continued³⁴ and the employer is prohibited from making any change in wages and working conditions once the application has been made, unless he has the consent of the Board. Under the old Act the employer could make such changes if he had "consent *by* or on behalf of the employees". Since the apparent purpose of such a provision is to prevent the employer from undercutting the applicant union by dealing with the employees individually³⁵ the change seemed called for.

32. S. 28 (1).

33. E.g. see Canada Labour Code, Part V, S.C. 1972, c. 18, s. 124 (2) (d).

34. See R.S.N.S. 1967, c. 311, s. 7 (5).

35. Christie and Gorsky, "Unfair Labour Practices: An Exploratory Study of the Efficacy of the Law in Unfair Labour Practices in Canada"; Study No. 10, Privy Council Office Task Force on Labour Relations (1968), p. 48.

Section 23 reiterates the craft unit provisions of the old Act, with the difference that where its predecessor provided that a craft union "shall be entitled to be certified"³⁶ the new section provides that the union "may" be certified. This appears to render redundant subsection (2) of Section 23, which provides that the Board "is not required to apply this Section" where the employees involved are already in the bargaining unit. In any case, the Section is of relatively little importance in light of the fact that craft unions in the construction industry fall under the jurisdiction of the Construction Industry Panel and Part II of the new Act.

A major substantive change in the labour law of Nova Scotia is effected by the second subsection of Section 24 of the new Act. On an application for certification the Labour Relations Board is required to dismiss the application if the applicant cannot prove to the Board's satisfaction that 40% of the employees in the unit are members in good standing. The Board "shall order" a vote if it is satisfied that more than 40% but not more than 60% of the employees in the unit are members in good standing, but paragraph (c) of the subsection somewhat paradoxically provides that

If the Board is satisfied that the applicant trade union has as members in good standing more than 50% of the employees in the unit and the Board is satisfied that no useful purpose in determining the true wishes of the employees will be served by conducting a vote among the employees in the unit, it may certify the trade union as the bargaining agent of the employees in the unit.

This gives the Board leeway where there has been illegitimate employer interference, although the Board need not and probably will not confine the use of its power under this paragraph to such cases.

Although of much less practical importance, subsection (7) of Section 24 is important in principle in that a union is now disentitled to certification not only by reason of management domination, as formerly, but also if it discriminates in a manner

36. R.S.N.S. 1967, c. 311, s. 8.

prohibited by the Human Rights Act³⁷. The subsection also provides that no agreement with such a union shall be deemed to be a collective agreement under the Act.

Amendment of Certification and Termination of Bargaining Rights

The new Trade Union Act retains the unique provision added by the 1968 amendment³⁸ which specifically empowers the Labour Relations Board to amend a certification, not only by changing the name of the union or employer where the name has in fact been changed, but also by including or excluding specific classes of employees. As far as the employees involved are concerned such applications to amend are, of course, tantamount to applications for certification or revocation of certification and the new Regulations give some indication that the Board will give them the serious consideration they deserve. Regulation 20 provides that an application to amend a certification order to include or exclude classifications of employees, shall, subject to the direction of the Board, "be processed as an Application for Certification" or "as an Application for Revocation of Certification" as the case may be. An inept change in a certification order made mid-term in a collective agreement could give rise to untold confusion, where the agreement did not have a classification to cover the added employees, for example.

Revocation of Certification is provided for by Section 27, which is at least a clarification and perhaps a change in the predecessor section. It is now clear that at any time during the open season, which is the period when another union could make application for certification, but only then, the employees in the unit for which a union is certified may apply for revocation. Where it is satisfied of one of two things the Board will order a vote³⁹; either, as previously provided, where it is

37. S.N.S. 1969, c. 11.

38. S. 26, formerly s. 10A of R.S.N.S. 1967, c. 311, originally enacted by S.N.S. 1968, c. 49, s. 4. In the Ontario Labour Relations Act, for example, there is no such power specified, although the O.L.R.B. might well have the power to amend under its general power to reconsider. See R.S.O. 1970, c. 232, s. 95 (1).

39. S. 27 provides that the Board "may" order a vote, and this, of course, means that the Board has an ultimate discretion in the matter.

satisfied that the union no longer represents a majority of the employees in the unit or where it is satisfied that "a significant number of members of the trade union allege that it is not adequately fulfilling its responsibilities to the employees". The purpose of providing alternative grounds for ordering a vote is, apparently, to meet the case where the union claims that since a majority of the employees are members it must, on the face of it, "represent" them. The Board has already held in the course of two hearings, after which votes were ordered, that the only relevant evidence in an application on these grounds is evidence of what "a significant number" truly "allege". Evidence which goes to show only that the union is in fact discharging its responsibilities is not relevant⁴⁰. It has been noted that the allegation must be by "union members" and need be by only "a significant number" of them. There has been no ruling on what constitutes "a significant number".

No special provision is made for a revocation of bargaining rights gained through voluntary recognition. Under the Ontario Labour Relations Act⁴¹, for instance, the whole of the first year of a voluntary recognition agreement is, in effect, a special open season. Under the new Nova Scotia Act, as explained earlier, protection against sweetheart agreements is provided instead through a more formalized mechanism of voluntary recognition⁴².

Transfer of Business and Successor Rights.

The section of the Act dealing with business transfers is extended to include an employer whom the Board is satisfied has "contracted out or agreed to contract out work regularly done by his employees to avoid obligations under the Act"⁴³. "Contracting out" is defined in Section 1(i), and by Section 18(1) (j) the Board is given power to determine when there has been a "contracting out" of work for the purposes of this Section. Where an employer has contracted out or agreed to

40. L.R.B. Ho. 1938 and L.R.B. No. 1935.

41. R.S.O. 1970, c. 232, s. 52.

42. See s. 28 and the discussion earlier of the definitions of "certified bargaining agent" and "collective agreement" contained in s. 1 (1) (c) and (e).

43. S. 29 (2).

contract out a significant part of the work done by his employees contrary to the Section the Board has the same broad power with regard to the effect of any certification order or collective agreement binding upon him that it has when he sells, leases or transfers his business.

This new power is undoubtedly important in principle. How frequently it will be invoked is less certain. In any case, taken together with the Board's pre-existing power to protect collective bargaining rights in cases of the transfer of all or part of a business and its new power under Section 20 to pierce the corporate veil it makes a package which may be very useful in preventing abuse of the Act.

Negotiation.

There is no change under the new Nova Scotia Trade Union Act in the concept, basic to Canadian labour legislation, of a statutory obligation to negotiate after certification or the termination of a collective agreement, for a period during which there can be no strike or lockout, or change in wages and working conditions. The only change of some practical importance is the revision of the "freeze" period, the period of the prohibition of any alteration of wages or working conditions, from twenty-one to fourteen days after the report of the conciliation officer⁴⁴. This is consistent with the change in Section 45 by which the waiting period prior to a legal strike is similarly revised.

As discussed earlier in connection with the "freeze" following an application for certification, consent to a change in wages or working condition may no longer be given "by or on behalf of the employees affected". Consent is now required from either the Board or the "certified or recognized bargaining agent".

It is, perhaps, appropriate at this point to note that the new Nova Scotia Trade Union Act does not make express provision for technological change during the life of a collective agreement. At least three Canadian Labour Relations statutes, the Canada Labour Code, and the Manitoba and Saskatchewan

44. S. 33 (b) (iii).

Acts,⁴⁵ make elaborate provision for compulsory bargaining over such change, provided that in the judgment of the appropriate tribunal, it is change of a degree that meets the statutory standard.

Section 43 (2) of the new Nova Scotia Act, like Section 20 (2) of its predecessor, does, however, specifically allow the parties to an agreement to provide for the mid-term amendment of the agreement. The new Act carries this through by imposing an obligation on the parties to meet and bargain, by imposing the "freeze" on wages and working conditions and by providing for conciliation where notice to bargain is given pursuant to such a provision in a collective agreement. Section 46 (2) of the new Act completes the matter by reenacting the substance of Section 23 (2) of the former Trade Union Act and providing expressly for a legal strike following unsuccessful mid-term negotiations of this kind. Paradoxically, neither the Saskatchewan nor the Federal Act appears to allow for a legal mid-term strike unless there is a re-opener clause⁴⁶. Thus, despite the apparent concern over a mid-term technological change in those jurisdictions, their legislation differs in effect from Nova Scotia's only in providing for a three month delay in the introduction of technological change where there is no re-opener clause in the collective agreement.

The mechanics of negotiation with the assistance of a conciliation officer⁴⁷ or, if mutually requested or imposed by the Minister of Labour, a conciliation board⁴⁸, insofar as they are governed by the Act, are unchanged. The provision for "preventive mediation"⁴⁹ is also unchanged.

Collective Agreement and Arbitration.

The former Nova Scotia Trade Union Act empowered the Labour Relations Board, upon the application of either party,

45. Canada Labour Code, *supra* fn. 33, s. 149-153; Sask. Trade Union Act, *supra* fn. 28, s. 42 and The Labour Relations Act, C.C.S.M., c. L-10, ss. 72-75. (1972) 37

46. Christie, "A New Law for Labour in Saskatchewan?", The Sask. Law Review. 136

47. Ss. 35, 36 and 37, and see R.S.N.S. 1967, c. 311, ss. 16 and 17.

48. Ss. 59 - 70, and see R.S.N.S. 1967, c. 311, ss. 28 - 37.

49. S. 38, and see R.S.N.S. 1967, c. 311, s. 17A.

to write in an arbitration provision when none was provided for in the collective agreement⁵⁰. Section 40 (2) of the new Act instead sets out a model arbitration provision which will be deemed to be included if the parties have not provided otherwise. This avoids the necessity of a proceeding before the Board.

An important innovation is that the new statutory arbitration section provides for a single arbitrator rather than a three-man board. There are substantial economies of time and money involved in reliance in a single arbitrator, with only marginal losses in terms of confidence of the parties and a source of knowledge of the work place. If the parties think a three-man board will be particularly appropriate they may, of course, provide for it and make the provision for a single arbitrator inapplicable. One view is that quite often in the course of negotiations the parties by agreement adopt the arbitration clause set out in the Act. If this is so, the espousal by the Labour Relations Act of the single arbitrator model of dispute settlement will lead to its much more widespread use in Nova Scotia.

Formerly the Trade Union Act said nothing about labour arbitration as an institution, beyond requiring that every collective agreement must provide for final and binding settlement of all disputes "by arbitration or otherwise". This formula, which has been held⁵¹ to establish that an arbitration board under the Act is not a statutory tribunal and therefore not subject to *certiorari*⁵², is repeated in the new Act. However, an arbitrator or arbitration board appointed pursuant

50. *Ibid.*, s. 19 (2).

51. *Howe Sound Co. v. International Union of Mine and Mill and Smelter Workers (Canada)*, Local 663 (1962), 33 D.L.R. (2d) 1 (S.C.C.). In *R. v. Board of Arbitration, Ex. p. Cumberland Railway Company* (1968), 67 D.L.R. (2d) 135 (N.S.C.A.) the Nova Scotia Appeal Court followed the *Howe Sound* decision. The *Howe Sound* case involved B.C. legislation and the *Cumberland Railway* decision was based on the federal Act.

52. Presumably labour arbitration is subject to the Arbitration Act, R.S.N.S. 1967, c. 12. See Carrothers, "Labor Arbitration in Canada" (1961) at p. 99, citing *Re Canadian Gypsum Co. Ltd. and Nova Scotia Quarryworkers' Union*, Local 294 C.L.C. (1959), 20 D.L.R. (2d) 219 (N.S.S.C. en banc).

to a collective agreement is now explicitly given certain powers: the power to determine his own procedure, subject to the right of the parties to make submissions and present evidence, the powers of a Commissioner under the Public Inquiries Act, the power to receive evidence and information on oath, by affidavit or otherwise as he deems proper, whether admissible in court or not, the power to determine whether a question is arbitrable and the power to substitute for discipline imposed by management a lesser penalty which he deems just and reasonable⁵³. This last power is granted by statute in response to the Supreme Court decision in the *Port Arthur Ship Building* case⁵⁴ which has been widely subject to legislative reversal⁵⁵.

Section 41(e) of the new Nova Scotia Trade Union Act is a unique provision by which an arbitrator is given the power to treat as part of the collective agreement before him the provisions of any statute of the Province of Nova Scotia governing relations between the employer and his employees. In the absence of such a provision it has been held in Ontario that where the words of a collective agreement are clear, even though they contravene the provision of a provincial statute, an arbitrator must give effect to them since he draws his jurisdiction from the collective agreement alone⁵⁶. The paradox is that the parties to the collective agreement are, of course, bound to observe provincial law in priority to the collective agreement. Section 41(e) is therefore desirable to ensure both that arbitration not be rendered a fruitless procedure where a statute is relevant to the employment relationship and that an arbitrator not be put in the position of having to order parties to a collective agreement to do that which is unlawful.

There is a change in Section 7, one of the "General" provisions of the Nova Scotia Trade Union Act, which is of particular importance in connection with arbitration. Section

53. S. 41.

54. *Port Arthur Shipbuilding Company v. Arthurs et al.* (1968), 70 D.L.R. (2d) 693 (S.C.C.).

55. E.g. Canada Labour Code, Part V, *supra* fn. 33, s. 157 (d), New Brunswick Industrial Relations Act, S.N.B. 1971, c. 9, s. 77 (4), Ontario Labour Relations Act, R.S.O. 1970, c. 232, s. 37 (8), and Saskatchewan Trade Union Act, *supra* fn. 28, s. 25 (3).

56. *R. v. Krever, Ex parte, International Chemical Workers Union* (1968), 66 D.L.R. (2d) 597 (Ont. H.C.).

51 of the old Act provided that "no proceeding under this Act shall be deemed invalid by reason of any defect in form or any technical irregularity". In the *Union Carbide* case⁵⁷ the Supreme Court of Canada held that proceedings before a board of arbitration were not "proceedings" within the purview of a similar section of the Ontario Labour Relations Act⁵⁸. It is therefore of some real significance that Section 7 of the new Nova Scotia Act refers specifically to "proceedings in accordance with Section 40, which is the "settlement by arbitration or otherwise" provision and to "arbitration in accordance with Section 103", which makes special provision for construction industry arbitration.

Section 42 of the new Act goes off in a somewhat different direction to fill a gap that existed under the old Act. As noted above⁵⁹, once notice to bargain has been given an employer may not change wages and working conditions until the required conciliation procedures and waiting periods have been exhausted⁶⁰. Thus, when a collective agreement terminates work goes on up to the strike date under what are, in effect, statute-imposed terms and conditions of employment. Section 42 now provides that the arbitration provision, or other means provided for settling differences under an agreement, continues to apply and provides a means for the settlement of disputes about the meaning or application of such statute-imposed terms and conditions. A similar amendment was recently made to the Ontario Labour Relations Act⁶¹.

Strikes and Lockouts.

The new legislation, like its predecessor, conforms to the general pattern of Canadian legislation on the legality of strikes. It requires the elapse of a waiting period after notice to bargain has been given in accordance with the Act, which effectively means that there must be a certified⁶² bargaining agent and no

57. *Union Carbide Canada Limited v. Weiler et al.* (1968), 70 D.L.R. (2d) 333 (S.C.C.).

58. See now R.S.O. 1970, c. 232, s. 103.

59. See fn. 44 *supra*, and accompanying text.

60. Ss. 33 and 50 (a).

61. R.S.O. 1970, c. 232, s. 70 (3).

62. The definition of "certified" bargaining agent includes a union which has been afforded formal voluntary recognition. See s. 1 (1) (c).

existing collective agreement. It also requires the completion of conciliation procedures and a positive strike vote before there can be a legal strike⁶³. In addition, the prohibition of a strike where both the employer and employees have voted in favour of the report of a conciliation board is retained⁶⁴. However, there is no requirement that such a vote be held, and, as in the case of a strike vote, it is not government supervised. In fact the only changes affecting the timing of strikes are the reduction of the waiting period before a strike is legal from twenty-one days after the conciliation officer's report to fourteen⁶⁵ and a new requirement that the Minister of Labour be given forty-eight hours notice of any strike⁶⁶.

Section 45 (2) introduces one further change in providing that where a union remains in a strike position for six months or more without actually going on strike the right to strike is lost until the union has again gone through conciliation. There was some experience in Nova Scotia with the union simply maintaining a strike position indefinitely, and this surely was contrary to the general intention, if not the letter, of the old Act.

The very broad powers of the Nova Scotia Labour Relations Board not only to sort out jurisdictional disputes but also to enjoin illegal strikes and picketing in support thereof are continued with no change in substance. However, the Act now contains a direct prohibition of any involvement in a work stoppage, where the predecessor provision implied such a prohibition but did not directly so provide⁶⁷. The Board has established by Regulation⁶⁸ the form in which an application is to be made in the event of a work stoppage or jurisdictional dispute, with an eye to ensuring that all relevant information is before the Board. No hearing is required before the Board issues its interim order but the Board must be alert to the natural justice implications of its power and protect against abuse by

63. Ss. 45 (1) and (3) and 46.

64. S. 47 (1).

65. S. 45 (1) (c) and see the former Act, R.S.N.S. 1967, c. 311, s. 22.

66. S. 47 (2).

67. S. 48 and see ss. 49 and 50.

68. See Regs. 24 and 25 and Forms 14 and 15.

scrupulous adherence to the direction in Section 49 that it "investigate" any complaint before issuing an order.

Unfair Practices.

The unfair practices provisions of the new Canada Labour Code⁶⁹ have been adopted almost in their entirety by the Nova Scotia Legislature. In relation to unfair labour practices by employers the main improvement is greater specificity and more clarity in the statement of prohibited practices and remedies.

Section 51(b), by which an employer may not deny any employee any pension rights or accrued benefits to which the employee would be entitled were it not for a legal strike or lockout or dismissal contrary to the Act⁷⁰ is an innovation.

Another important change is contained in Section 54(3) which provides that henceforth, where it is reasonable to believe that an employer has discriminated against any person in respect of his employment because of union membership or for exercising his rights under the Act, the burden of proof is on the employer. The Quebec Labour Code,⁷¹ has for ten years effected a legislative reversal of onus in harsher form and, for at least that long, the declared policy of the Ontario Labour Relations Board has been to shift the onus to the employer as soon as the complainant has gone through the formalities of establishing that he was an employee, that he was dismissed or otherwise penalized and that there were union organizing activities being carried out. Since the statutory prohibition against dismissal or other discrimination against an employee for union activities is, and must be, framed in terms of the employer's reasons, and thus calls for proof of motive, experience has shown that it is almost impossible to make a case

69. Canada Labour Code, Part V, *supra*, fn. 33, ss. 184-189.

70. In *Canadian Pacific Railway Company v. Zambri* (1962), 34 D.L.R. (2d) 654 (S.C.C.) Locke, J. raised the question of pension rights of employees on a legal strike. The question is particularly important where the strike does not end in agreement in the union and the employer. See Arthurs, "The Right to Strike in Ontario and the Common Law Provinces of Canada", (1967), Proceedings on the Fourth International Symposium on Comparative Law, University of Ottawa, 187.

71. R.S.Q. 1964, c. 141, s. 16.

without some form of shifted onus⁷². Furthermore, it is not unreasonable to ask the employer to establish that there was good reason for dismissal or other change in an employee's status. In the absence of direct evidence of anti-union animus proof of such reasons would presumably be sufficient to exonerate him.

One of the most significant aspects of the entire new Trade Union Act is the fact that the unfair practices part of the proposed statute borrows from the Canada Labour Code an enumeration of practices by trade unions which can give rise to a right of complaint by an individual employee to the Labour Relations Board. In some of the situations now covered by Section 52 of the new Nova Scotia Act, dealing with expulsion from a trade union, an individual might previously have had recourse to the courts, but the law was unclear and seldom invoked⁷³. Although the Board may not be called upon very often to deal with such cases legislative recognition of the place of the individual in the collective system is important in principle. The main difference from the Canada Labour Code appears in Section 52 (f) of the Nova Scotia Trade Union Act, which protects "any person" rather than "any employee" from discriminatory denial of union membership. This may be of considerable significance in closed shop situations, such as commonly occur in the construction industry. However, the meaning of the word "discriminatory" in this context requires elaboration.

By Section 52 (e) a trade union is also prohibited from requiring an employer to terminate the employment of an employee because he has been expelled from trade union membership for any reason other than the failure to pay uniformly required dues and assessments. The complement of this is Section 51 (3) (ii), which prohibits dismissal by the employer for such reasons.

72. Christie and Gorsky, "Unfair Labour Practices: An Exploratory Study of the Efficacy of the Law of Unfair Labour Practices in Canada", Study No. 10 for the Privy Council Office Task Force on Labour Relations (1968), p. 32.

73. *Ibid.*, at p. 80 and see Carrothers "Collective Bargaining Law in Canada", (1965), pp. 501 ff.

A special procedure for complaints to the Labour Relations Board with regard to any employer or union unfair practices is provided, including specifically, provision that “the Board may assist the parties to the complaint to settle the complaint”⁷⁴. Section 53 of the new Act imposes a 90 day limitation period and makes complaints against trade unions subject to the requirement that internal remedies provided by the union have been exhausted, except where those remedies are not accessible or where it is imperative that the complaint be dealt with without delay. Regulation 26 contains further time limits and procedural prerequisites.

Section 51 (3) (g) makes bargaining with a union other than the one certified an unfair labour practice. Complementing Section 51 (3) (g) is Section 52 (b) which makes it an unfair practice for such a union to bargain or sign an agreement with the employer. Trade unions and persons acting on their behalf are also prohibited by Section 52 (a) from “seeking to compel” an employer to bargain if the union is not the bargaining agent for its employees.

Complaints with regard to bargaining with other than a certified union may be made only with the consent in writing of the Minister of Labour⁷⁵. Section 34 (1) is related insofar as it provides that where there is a failure to bargain collectively in good faith in accordance with Section 33 a complaint in writing may be made to the Minister of Labour. Presumably these two enforcement provisions could be invoked at the same time, and this is facilitated by Regulation 27, which provides that a complaint under Section 34, when referred to the Labour Relations Board by the Minister of Labour, shall be processed as a complaint of an unfair labour practice.

Enforcement and Penalties.

There has been no change in the substance of the penalty provisions of the predecessor Trade Union Act. Several of the

74. Ss. 53 and 54, and note s. 54 (1) (a). Regulation 26 goes further, providing that the Chief Executive Officer “shall investigate a complaint” and “shall assist the parties to settle”. Presumably both the investigation and assistance could be perfunctory where intervention would obviously be fruitless.

75. S. 53 (5).

penalties enacted by amendments in the 1970-71 session of the Legislature are quite severe⁷⁶.

Section 85 provides a penalty for breach of an order of an arbitrator in the construction industry, as did its predecessor, Section 44B. However, the same penalty is now made applicable to breach of the order of an arbitrator acting under any collective agreement within the scope of the Act. In most Canadian jurisdictions the decisions of labour arbitrators are enforceable not by prosecution but rather, upon filing as orders of the High Court, by contempt proceedings.

It may be noted that the requirement of ministerial consent to a prosecution under the new Act, coupled with the Labour Minister's power to investigate any complaint through the appointment of an Industrial Inquiry Commission or otherwise constitutes an alternative remedy in the case of breaches of the Act over which the Labour Relations Board has jurisdiction, such as unfair labour practices or illegal strikes and picketing. In other cases, which do not fall within the ambit of Sections 51 and 52, prosecution with ministerial consent is the only remedy. For example, there is no other remedy where, after an application for certification has been made but notice to bargain has not been given, the employer changes wages or working conditions without the Board's consent, contrary to Section 22(7).

Part II – Construction Industry Labour Relations

All provisions of the Trade Union Act with special application to the construction industry have been grouped in Part II, but much of it is not new⁷⁷. All matters concerning employers and employees in the construction industry fall, as before, within the jurisdiction of the Construction Industry Panel, "a division of the Board"⁷⁸, which consists of additional members of the Labour Relations Board and a Chairman and Vice-Chairman. At present the Chairman of the Panel is the Chairman of the Board and the Vice-Chairman also holds the same position on the

76. S.N.S. 1970-71, c. 5, ss. 9, 10, 11 and 12.

77. See the former Act, R.S.N.S. 1967, c. 311, as am., ss. 7A, 19A and 56A.

78. S. 91 (11).

Board. The Chief Executive Officer and his staff serve both tribunals.

Certification in the construction industry is “speedy”,⁷⁹ the Panel need be satisfied that an applicant has only 35 rather than 40% membership in an appropriate bargaining unit to order a vote⁸⁰, and the appropriateness of units is to be determined by reference to geographic areas⁸¹. None of this is new, nor is Section 103, which provides, apparently quite successfully, for “instant arbitration” by single arbitrators in the construction industry. In fact, the only new sections in Part II are those providing for accreditation and for “no contract, no work”. About the second of these there is little to be said and about the first a great deal.

The new Regulations for the first time provide special procedures and forms for use in relation to the construction industry⁸².

Interpretation

The main effect of including special definitions of “employer”, “employee”, “union” and the like in the construction industry part of the Nova Scotia Trade Union Act is to provide a basis for determining whether the persons involved in any particular relationship are in fact in the construction industry and therefore subject to Part II of the Act and within the jurisdiction of the Panel. From this point of view the key is the definition of the “construction industry” itself. The definition has been changed from that in the former Trade Union Act by the addition of the words “on site” so that it now reads in part,

79. S. 93.

80. S. 92 (3).

81. The Panel has published a “Policy Statement” to the effect that, except in relation to four unions, unless there is convincing argument to the contrary, either mainland Nova Scotia or the Island of Cape Breton will be used as the area of an appropriate unit. Since the issuance of the “Policy Statement” this policy has been extended by agreement to two of the unions named therein so that now the policy will be *prima facie*, applicable to all construction trade unions other than the International Brotherhood of Electrical Workers, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

82. See Regs. 28-39;.

“Construction industry” means the *on site* construction, erecting, altering, decorating, repairing or demolishing of buildings (etc.). . . .⁸³”

This change is, in fact, only a clarification because the Construction Industry Panel had interpreted the definition in the old Act as applying only to on-site construction. For instance, the installation aspects of the operations of Ideal Aluminum Company Limited were held to be in the construction industry and the fabricating aspect not to be⁸⁴.

There is some change, too, in the definition of “employer” in that, for purposes of the construction industry, the term now includes any person who “in the preceding twelve months has employed” more than one employee⁸⁵. Fluctuations of the construction industry necessitate this extended definition. Otherwise the certification of a small unit could be destroyed each winter.

A point of some difficulty has been raised in connection with the concluding words of the definition of “employer” in the construction industry part of the Act. By those words a construction industry employer is defined as a person who “operates a business in the construction industry”⁸⁶. The difficulty arises where an industrial employer undertakes major construction, probably supplementing his regular employees with construction tradesman. Is he then “operating a business in the construction industry”? To hold that the only person who can be said to be operating such a business is one who builds or repairs under contract for another is to open the door wide to those who would circumvent Part II of the Act. The line marking off the construction industry must be drawn in some other way. In a leading decision⁸⁷, the Ontario Labour Relations Board held that a company incorporated by a hotelier and a builder to build and then operate hotels was operating “a business in the construction industry” insofar as the company was engaged in building rather than operating. Similarly, the Nova Scotia Panel held that the Power Commission was subject

83. S. 89 (c).

84. L.R.B. No. 149C.

85. S. 89 (f).

86. *Id.*

87. *Tops Marina Hotel*, OLRB Monthly Report, Jan. 1964, 583.

to Part II of the Act insofar as it undertook on its own the electrical aspects of the construction of the new Tufts Cove power station, using tradesmen hired through the construction local of the I.B.E.W. In the opinion of the Panel that project went well beyond normal maintenance and development, and constituted operating a "business in the construction industry".

Accreditation

Accreditation appears to parallel on the employer's side what certification achieves on the employee's side⁸⁸. An employers' organization gains accreditation by demonstrating to the Construction Industry Panel that it has the support of unionized employers in a sector and geographic area applied for. Once the employers' association is accredited it has exclusive bargaining rights for all unionized employers in that sector and area, and those employers are bound by any collective agreement entered into between the accredited employers' association and the trade union or council of trade unions⁸⁹. Individual negotiations between employers in the accredited sector and area in any trade unions are prohibited and any resulting collective agreements are not binding. Neither the trade union nor the employers' organization can waive this provision.

It should be noted that accreditation *binds only unionized employers*, but it binds them whether or not they are members of the accredited organization.

Similar legislation has been passed in Alberta, Ontario and New Brunswick, and British Columbia has adopted a rather different version of compulsory multi-employer bargaining that is not confined to the construction industry⁹⁰. The scheme is the brain-child of Professor John Crispo of the University of Toronto⁹¹, and was recommended for adoption in Nova Scotia

88. Ss. 94-99.

89. Ss. 95 and 97.

90. J. Dorsey, *Accreditation in Construction Labour Relations* (unpublished).

91. Crispo, "Union-Management Relations in the Construction Industry - The Outlook in Ontario" (1963), 14 L.R.J. 708 and "Labour Management Relations in the Construction Industry: The Findings of the Goldenberg Commission" (1963), 29 C.J.E.P.S. 348.

in the Woods Royal Commission report on the construction industry⁹². The specific wording of the new Nova Scotia Trade Union Act is based for the most part on the recommendations of the Joint Labour Management Study Committee.

The Ontario legislation provides for the accreditation of an organization which has as members the majority of those unionized employers who bargain *with a particular trade union*. The Nova Scotia legislation is much broader in that it lumps all unionized employers in a "sector" of the construction industry into a single "unit". "Sector" is defined as meaning "one of the following divisions in the construction industry: (1) industrial and commercial; (2) housebuilding; (3) sewers, tunnels, and water mains; and (4) road building, or any other sectors determined by the Panel"⁹³.

In determining whether an applicant employers' organization is sufficiently representative to be accredited the Panel is required by Section 94(3) to apply a double standard: either the employers' organization must have as members a majority of the unionized employers in a sector and geographic area applied for *or* it must have as members no less than 35% of such employers and those employers must employ a majority of the unionized employees in the sector and area applied for. Section 94 also gives the Panel the wide powers necessary to enable it to determine the number of unionized employers in the sector and area applied for and the number of them who were members of the employers' organization when the application was made. Regulations made by the Labour Relations Board pursuant to the Act spell out to some degree the procedure for the making of these determinations, and forms are provided⁹⁴.

Before the Panel accredits an employers' organization it is required to satisfy itself that the organization is a properly constituted organization "controlled by its members", that each of its members has vested appropriate authority in the organization to enable it to discharge the responsibilities of an accredited bargaining agent, and that the employers' organiza-

92. Report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry (1970).

93. S. 89 (h).

94. Regs. 31-35; Reg. 36 governs the revocation of accreditation.

tion does not have discriminatory membership policies⁹⁵. In the same vein employers are afforded protection against expulsion from accredited employers' organizations for irrelevant reasons⁹⁶.

Section 98 provides for revocation of accreditation where a majority of the employers in a unit no longer wish to be represented by the accredited organization. As mentioned above, a peculiarity of the Nova Scotia scheme of accreditation is that an accreditation order vests in the accredited organization the bargaining rights of all unionized employers in the unit with any union, not just, as in Ontario, with a particular union. An accredited employers' organization will therefore, in all likelihood, make a number of collective agreements with different termination dates. The employers' organization will undoubtedly strive for a common termination date but there is no guarantee that this goal will be attained. Thus there will be no one "open season" based on the life of a collective agreement to which a revocation of accreditation application can be tied, as decertification is. The solution adopted by the legislature is to allow for an application for revocation of accreditation at the end of the fourth year of an accreditation order and at the end of every three years thereafter. This allows for a year of bargaining following accreditation and for stability for the ensuing three years, which is the probable term of any agreement negotiated. The three-year periods thereafter should coincide roughly with most of the accredited organizations' agreements.

On revocation of accreditation all rights, duties and obligations under the Act for any unexpired collective agreement revert to the individual employers⁹⁷.

Negotiation and Strikes

When notice to commence collective bargaining has been given by a trade union, council of trade unions, employer or accredited employers' organization in the construction industry Section 100 requires the parties to meet and bargain collectively within five clear days. The obligation is similar to that imposed

95. S. 94 (8), (9) and (10).

96. S. 96.

97. S. 98 (5).

on employers and unions outside the construction industry by Section 33, except that the time is reduced from twenty clear days to five. The previous legislation provided that an order of certification by the Construction Industry Panel constituted notice to bargain. The purpose was to abridge the time for negotiation but this provision gave rise to uncertainty about where the obligation actually to commence negotiations rested. Section 100 reimposes the normal obligation to give notice to bargain, placing it upon the party who wishes to get on with negotiations, and simply substitutes a shorter period within which the other party must meet him.

In other and more important respects the waiting periods which must be exhausted before a strike becomes legal are different in the construction industry. Where a collective agreement has terminated the principle of "no contract, no work" now applies, in the sense that the employees are permitted by section 102, to strike immediately, provided they have had cancellation, when the union is newly certified the employees may strike when ninety days have elapsed from the date of receipt of the notice to commence collective bargaining. The earliest date of any possible legal strike is therefore determinable for some time in advance. Because the strike date is not calculated on the basis of a number of days following the conciliation officer's report, as it is under Part I of the Act, the officer may, as a regular matter and not merely by way of *ad hoc* "post-conciliation", participate in negotiations on the eve of the strike.

Conclusion

Apart from the adoption of accreditation in the construction industry and the provision of protection for the individual against unfair union practices the Trade Union Act, 1972, of Nova Scotia contains few major departures in principle from its predecessor, and almost nothing that has not been tried in other jurisdictions in Canada. Many of the changes may, however, affect the operation of the Act in a way which is significant to the parties and their legal counsel.

The impact of the major changes in the Trade Union Act, particularly the introduction of accreditation is difficult to predict, and so is the effect of many apparently minor

adjustments. The new Trade Union Act is, without much doubt, an improvement over the one it replaced. Beyond that, any value judgments must be left to impartial and uninvolved observers and to the joint judgments of management and labour, as they gain experience under the new legislation. One thing is certain about a statute dealing with labour relations is that the new Act will become outdated and will have to be reformed.